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April 21, 1997

HAND DELIVERY

William Caton
Office of the Secretary
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Cablevision Systems Corporation's ("Cablevision") Answer to Classic Sports
Network, Inc.'s Complaint

Dear Mr. Caton:

Enclosed please find Cablevision's Answer to Classic Sports Network, Inc.'s complaint. Pursuant to 47 C.F.R. § 76.1302(h), Cablevision is submitting proprietary and confidential information in conjunction with the filing of its Answer. Cablevision requests that its Answer be accorded full confidential treatment according to 47 C.F.R. § 76.1302(h). Cablevision will file a public version of its Answer within five business days as required by 47 C.F.R. § 76.1302(i)(5).

If you have any questions concerning this matter, please contact me.

Sincerely,



Michael B. Bressman

Enclosure

cc: Robert A. Garrett

RECEIVED

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

APR 28 1997

Federal Communications Commission
Office of Secretary

In the Matter of)	
)	DOCKET FILE COPY ORIGINAL
CLASSIC SPORTS NETWORK, INC.,)	
)	
Complainant,)	
)	
v.)	File No. _____
)	
CABLEVISION SYSTEMS CORPORATION,)	
)	
Defendant.)	
)	

ANSWER

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April 21, 1997

TABLE OF CONTENTS

INTRODUCTION	1
THE FACTS	5
Cablevision's Negotiations and Carriage of CSN's Service	5
Rainbow's Development of Vintage Sports Programming	9
ARGUMENT	12
I. CSN HAS FAILED TO PROVIDE DOCUMENTATION OR AFFIDAVITS TO SUPPORT THE FACTS ON WHICH IT BASES ITS COMPLAINT	12
II. THERE IS NO BASIS FOR FINDING CABLEVISION IN VIOLATION OF SECTION 616	13
III. DISCUSSIONS BETWEEN RAINBOW AND CSN WERE UNRELATED TO THE NEGOTIATIONS OVER CARRIAGE	20
IV. THE COMMISSION SHOULD NOT PERMIT CSN TO USE THE CARRIAGE COMPLAINT RULES TO FORECLOSE OR INTERFERE WITH THE LAUNCH OF A SUPERIOR COMPETING SERVICE	22
V. CSN CAN USE COMMERCIAL LEASED ACCESS TO OBTAIN CARRIAGE ON CABLEVISION'S SYSTEMS	23
RESPONSE TO NUMBERED PARAGRAPHS	24
RESPONSE TO REQUEST FOR RELIEF	33
CONCLUSION	34

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 Complainant,)
)
 v.)
)
 CABLEVISION SYSTEMS CORPORATION ,)
)
 Defendant.)
)

File No. _____

ANSWER

Pursuant to 47 C.F.R. § 76.1302(d), Defendant Cablevision Systems Corporation ("Cablevision"), through its attorneys, hereby answers the complaint filed by Classic Sports Network, Inc. ("CSN"), which alleges that Cablevision refused to carry Classic Sports Network (the "Service") unless CSN sold Cablevision an equity interest in CSN or granted Cablevision exclusive distribution rights for the Service, in alleged violation of section 616 of the Communications Act of 1934 (the "Act") and the Commission's rules thereunder. For the reasons stated below, CSN's complaint should be dismissed with prejudice.

INTRODUCTION

1. Despite all the fanfare and publicity, the salient facts of this case as alleged by CSN utterly fail to establish a claim against Cablevision. First, CSN concedes that Cablevision executed a master affiliation agreement with CSN in August 1995. Cablevision signed that

agreement even after CSN refused to grant its request for exclusivity. Cablevision in fact does carry the Service on four systems -- Boston and Brookline in Massachusetts and North Olmstead and Berea in Ohio. Second, Cablevision provides carriage on these systems even though Cablevision does not own a financial interest in CSN and does not have any exclusive rights. In fact, Ameritech carries the Service in North Olmstead and Berea, Ohio on cable systems in direct competition with Cablevision. Third, CSN itself proffered exclusivity as an incentive for Cablevision to expand its carriage of the service.

2. Discussions between CSN, Rainbow Media Holdings, Inc. ("Rainbow"),^{1/} and Rainbow's SportsChannel services over possible ownership of CSN occurred sporadically for more than a year and were never implicitly or explicitly linked to CSN's requests for carriage. Rather, those discussions were a natural outgrowth of Rainbow's long-standing interest in establishing a vintage sports service. Rainbow, one of the first cable sports programmers in the nation, had been exhibiting vintage games on its SportsChannel services for years before CSN was launched.

3. CSN has filed its complaint to force Cablevision to carry the Service on Cablevision's New York systems. Nothing in section 616 or in CSN's agreement with Cablevision compels this additional carriage. Indeed, the facts demonstrate that CSN's own conduct has been a significant barrier to carriage in New York. CSN has refused to make the Service available to Cablevision at a rate consistent with what other start-up services receive for

^{1/} Rainbow is the managing partner of American Movies Classics Company, Bravo Company, MuchMusic, NewSport, The Independent Film Channel, Romance Classics, and various regional SportsChannel services. Cablevision currently owns 75 percent of Rainbow, with NBC owning the remaining 25 percent.

carriage in the New York ADI. The question of whether to carry CSN is also complicated by CSN's decision to launch its Service on WBIS, a local broadcaster with must carry status on New York area cable systems. From July 1, 1996 through January 21, 1997, CSN's Service was available to every Cablevision subscriber in the New York area for free on WBIS. Cablevision had no reason to devote a second channel to the Service when subscribers were already receiving it via WBIS. Even now, it is far from certain that subscribers would have any interest in paying for a service that until recently was available at no charge.

4. CSN's complaint is also a blatantly anticompetitive attempt to impede the launch of Rainbow's new vintage sports service, American Sports Classics ("ASC"). Not coincidentally, CSN filed the complaint on the same day that Rainbow announced ASC, apparently intending to stifle ASC and hoping that cable operators will be reluctant to offer carriage while this dispute is pending. CSN's campaign of misinformation and threats has had an effect. ASC's carriage discussions with cable operators have revealed that CSN's complaint concerns many of them. Some are taking a wait and see attitude; some have even asked ASC to provide indemnification in case CSN sues them. Clearly, neither Congress nor the Commission intended section 616 and the rules thereunder to be used as a means to foreclose competition to the detriment of consumers.

5. Because the facts do not support CSN's complaint, it must base its claims on a distorted picture of its carriage negotiations with Cablevision. CSN takes conversations out of context; mixes discussions with Cablevision, Rainbow, and SportsChannel concerning different issues as if all of the discussions were interchangeable; and in some cases asserts outright misstatements. The baselessness of CSN's complaint and the unreliability of its version of the

facts are epitomized by its use of an unnamed "intermediary" as the source of an alleged quote made by a Cablevision executive concerning carriage of the Service. Anonymous sources may have a place in The Washington Post, but they have no place in a complaint filed with the Commission. The Commission should not countenance a complaint based on unsupported allegations.

6. CSN's complaint also ignores marketplace reality. Numerous programmers request carriage for the limited number of channels available on the cable systems of Cablevision and virtually every other cable operator in the country. Cablevision considers many factors -- price, value, editorial mix, etc. -- in choosing which programming services to carry. Aggressive negotiations on issues such as price, terms of carriage, and even exclusivity take place. In a marketplace characterized by high demand and limited supply, this is how the process works, and this is how both Congress and the Commission intended it to work. For that matter, this is how every cable operator and programmer knows the process works -- except CSN. CSN believes it should be permitted to play by its own rules -- to dictate where, when, and on what terms its Service will be carried.

7. Congress enacted section 616 to address some programmers' claims that they could not gain access to the critical mass of subscribers necessary for survival without involuntarily relinquishing ownership rights. That is emphatically not this case. CSN is being carried by Cablevision, and Cablevision's reasonable decision not to carry the service on systems serving less than 2 percent of all cable households nationwide will not undermine its viability. To the contrary, CSN itself claims that it has carriage agreements with other major MSOs. Even without carriage on Cablevision, CSN has access to other multichannel video programming

distributors, such as DBS, SMATV, and LMDS, to reach subscribers in Cablevision's franchise areas.

8. Section 616 does not authorize the Commission to referee garden-variety carriage disputes such as the one between Cablevision and CSN. As the Commission has acknowledged, section 616 does not foreclose vigorous negotiations. If CSN's complaint succeeds, the Commission will be faced with a flood of similar actions by other programmers who are dissatisfied with the outcome of negotiations with operators and who seek to use section 616 to rewrite the terms of a deal. Congress never intended section 616 as an invitation to micromanage operator-programmer relations.

9. Congress was aware that carriage on a particular system might not be available for various reasons. To accommodate that situation, Congress provided a viable alternative -- commercial leased access. The Commission recently reduced the rates for leased access channels to make them more accessible. If CSN's Service is as popular as CSN claims, it should have no trouble gaining a substantial following through commercial leased access.

THE FACTS

Cablevision's Negotiations and Carriage of CSN's Service

10. As CSN itself acknowledges, Cablevision and CSN negotiated and executed a master affiliation agreement for carriage of CSN's Service in 1995. Pursuant to that agreement and two amendments to it, Cablevision currently carries CSN's Service on four systems. That Cablevision currently does not carry the Service on additional systems is the result of legitimate business reasons, such as CSN's decision to distribute its Service in the New York area on

WBIS; high rates for a poorly executed classic sports service that is essentially limited to non-exclusive replays of old games; channel capacity restrictions and delays in system rebuilds; and onerous penetration requirements to qualify for lower rates.

11. CSN first contacted Cablevision concerning carriage of the Service in early 1995. On March 13, 1995, Mac Budill, Cablevision's Director of Programming, and Brian Bedol, CSN's Chief Executive Officer, met to begin the process of negotiating a master affiliation agreement. CSN presented Cablevision with a proposal for carriage on May 18, 1995, which contained unusually high rates for an untested start-up service. Even CSN's "charter" rates were excessive, albeit lower than the rates available if Cablevision failed to qualify for the charter rates. Although Cablevision informed CSN that these rates were outside the industry norms and unacceptable, especially for a service that essentially provided non-exclusive replays of old games, it was willing to negotiate a licensing agreement.

12. Over the next several months, Budill and Thomas Montemagno, Cablevision's Program Manager, continued to negotiate with Stephen Greenberg, President of CSN, toward a master affiliation. Cablevision pressed for lower rates that would reflect the value to CSN of carriage in Cablevision's markets, particularly the New York ADI, as it had successfully done within other program affiliation contracts, but CSN did not want to lower the rates. Instead, Cablevision received

The parties also discussed exclusivity rights. CSN refused Cablevision's request for exclusivity,

Cablevision executed the agreement, despite the lack of exclusivity.

13. The parties signed the master affiliation agreement in the middle of August 1995. Due to a lack of channel capacity and consideration of editorial mix on Cablevision's Woodbury, New York system, Cablevision decided not to launch the Service there, as had been discussed. Cablevision subsequently decided not to launch the service on its Norwalk, Connecticut system in part because Cablevision was still concerned about the rate for the Service. The decisions not to launch were permissible under the terms of the master affiliation agreement.

14. Cablevision launched the Service on its Boston and Brookline systems in March 1996. Before doing so, however, Cablevision insisted on lower rates. The parties then negotiated two amendments to the master agreement -- one specifically for the Boston and Brookline systems, and one for Cablevision's other systems.^{2/} The amendments reduced substantially the rates for carrying the Service for a period of time and reduced the tier fees by altering the penetration definition to increase a licensing system's penetration level under the agreement.

15. Also in early 1996, CSN began lobbying the system managers for Cablevision's Cleveland systems to carry the Service. Cablevision informed CSN that the proposed carriage rates were too high. CSN was unwilling to consider lowering its rates.

16. On July 1, 1996, CSN launched the Service in the New York ADI on WBIS, a local broadcast station that had exercised its must carry rights. Overnight, the Service became available to millions of New Yorkers for free. Not surprisingly, Cablevision concluded that there was no reason to launch the Service on a second channel on its New York systems.

^{2/} See Exhibit 1 attached hereto.

17. In an effort to expand its carriage on Cablevision's systems, CSN had approached Cablevision in March 1996 with an offer of exclusivity for Cablevision's Massachusetts, New York, and New Jersey systems. In July, CSN delivered its proposal. CSN was also making a similar offer to other MSOs. CSN's exclusivity proposal placed unacceptable carriage demands on Cablevision, however, with the Service currently available on WBIS. Moreover, exclusivity was essentially meaningless in New York. CSN and Cablevision continued carriage and exclusivity discussions in an October 9, 1996 meeting. Cablevision explained that it was more interested in exclusivity in Ohio and Connecticut, where Ameritech and Southern New England Telephone Company ("SNET"), respectively, had plans to overbuild. CSN indicated that exclusivity would be problematic in each of these areas. Because it had already entered into an agreement with Americast, the programming packager that was acquiring licensing rights for Ameritech, exclusivity in the Ohio systems was not possible. Moreover, SNET, which had recently become a partner in the Americast venture, took the position that it too had a right to carry the Service. CSN nonetheless told Cablevision that it disagreed with SNET's interpretation and offered to fight SNET on this issue. Cablevision did not at any time request CSN to challenge SNET. The parties never reached an agreement on exclusivity. CSN eventually authorized SNET to launch the Service.

18. Even though CSN could not give Cablevision exclusivity in its Ohio markets, Cablevision began previewing the Service during October on both its North Olmstead and Berea, Ohio systems for a test period. CSN subsequently renewed its inquiries about additional carriage on Cablevision's New York and Connecticut systems. No agreement was reached. On February

28, 1997, CSN notified Cablevision that it intended to file this complaint. On April 15, 1997, Cablevision launched the Service full-time on the North Olmstead and Berea systems.

Rainbow's Development of Vintage Sports Programming

19. Rainbow is the pioneer of sports programming in the cable industry. In the 1960s, Charles Dolan, Chairman of Cablevision, was the first to put professional sports programming on cable. He created the "SportsChannel" concept, regional sports networks that allow subscribers to follow all their local teams all the time. In 1994, Rainbow launched NewSport, a 24-hour all sports news and informational service, which is currently received by 8 million subscribers.

20. As part of Rainbow's long history of developing and distributing sports programming, its SportsChannel services began exhibiting vintage sports programming a decade before CSN was even launched. SportsChannel continues to provide vintage sports programs and series, which have included "Stanley Cup Highlights," comprised of old NHL highlight films; "Hall of Famer," hosted by Fran Healy, and featuring guests such as Joe Namath; "SportsChannel Profile" and "Halls of Fame"; "An Amazin' Era," a hosted show featuring Mets season highlights; "Baseball's Greatest Games," two-hour edited versions of Major League Baseball games; and "Cool Classics," old Devils and Islanders games hosted by SportsChannel hockey announcers. SportsChannel has also featured other vintage sports series and specials.

21. Rainbow has considered for a number of years moving beyond these limited vintage sports series to a more comprehensive vintage sports programming service. From its experience with these early efforts, Rainbow had concluded that a programming service that

simply showed old game footage has a limited appeal. Instead, SportsChannel determined that a successful vintage sports service must have behind-the-scenes interviews and programming that explore the stories behind the great sports stories, sports-themed movies and documentaries, and even original, first-run programs, in addition to considerable game footage. Such a programming service would be a natural fit with Rainbow's extensive sports programming and with its two classic movie services -- American Movie Classics and Romance Classics. American Sports Classics, announced March 17, 1997, is the fruition of Rainbow's development process.

22. There were a number of ways that Rainbow could have created ASC. In April 1994, Ed Frazier, then President of Liberty Sports, approached Josh Sapan, President of Rainbow, with one possible means. Frazier invited Rainbow to become a partner in the CSN venture. Sapan was uninterested, telling Frazier that Rainbow does not buy minority interests in programmers. After this initial approach, Sapan would periodically encounter CSN representatives, usually at cable events. As with his encounters with other programming executives, Sapan would float ideas and speculate about business opportunities, including the purchase of programming services. It is possible that Sapan discussed the purchase of CSN at some point.

23. After a September 1996 cable industry event in New York, Sapan and Hank Ratner, Rainbow's Executive Vice President, approached Greenberg of CSN to discuss the purchase of CSN. They explained that CSN's Service would complement Rainbow's existing programming services, especially since Rainbow has had many years of experience in this area. Two days later, Greenberg and Bedol met with Michael Bair, Executive Vice President of

Rainbow Sports, and Mark Shuken, Senior Vice President and General Manager of SportsChannel New York, to discuss a number of possible business arrangements between SportsChannel and CSN, which included the purchase of CSN. Greenberg and Bedol said they would take that offer back to CSN's board of directors for consideration.

24. When Greenberg visited Cablevision's offices on October 9, 1996 to discuss carriage issues, he met separately with Shuken of SportsChannel to follow-up on their earlier discussions. Seeing Greenberg at the SportsChannel offices, Ratner took the opportunity to ask again whether CSN was interested in selling. Greenberg indicated that CSN was not interested in selling CSN. Greenberg subsequently explained to Shuken and Bair (who had joined the meeting) that he and Bedol had pitched the idea of a sale to CSN's board of directors, but the board had rejected it. SportsChannel and Rainbow had no further discussions with CSN concerning the sale of CSN. At no time at this or any other meeting did anyone connected with Rainbow or SportsChannel seek to coerce the sale of CSN. Nor did anyone at Rainbow or SportsChannel ever discuss carriage of the Service on Cablevision's systems.

25. On March 17, 1997, Rainbow announced that it will launch ASC on July 9, 1997. Also on March 17, CSN filed this carriage complaint. Since that time, CSN has actively worked in the press, on Capitol Hill, and in private discussions with members of the cable industry to interfere with and prevent the successful launch of ASC.

ARGUMENT

I. CSN HAS FAILED TO PROVIDE DOCUMENTATION OR AFFIDAVITS TO SUPPORT THE FACTS ON WHICH IT BASES ITS COMPLAINT

26. CSN accuses Cablevision of attempting to “force the grant of exclusive rights . . . as a condition of carriage”^{3/} and engaging “in a clear and persistent pattern of conduct . . . of refusing to carry CSN . . . unless CSN accedes to ownership of” CSN.^{4/} The Commission requires a complaining party to set forth in its pleadings facts, which if true, are sufficient to constitute a violation of the Act or the Commission’s rules.^{5/} These facts must be supported by “relevant documentation or affidavit.”^{6/} Though CSN has made broad accusations, it has failed to satisfy this threshold requirement. It has provided no documentation demonstrating that Cablevision ever required a financial interest in CSN or exclusive distribution rights of the Service as a condition for distribution of the Service on Cablevision’s systems. CSN has deigned to provide only one generic two paragraph affidavit signed by its President, Stephen Greenberg, who according to the complaint does not have any first-hand knowledge of any

^{3/} Complaint at ¶ 56.

^{4/} Id. at ¶ 52.

^{5/} 47 C.F.R. § 76.1302(b)(2).

^{6/} 47 C.F.R. § 76.1302(b)(3).

conversation where Cablevision stated that it would not carry the Service unless it obtained an equity interest in CSN.^{7/}

27. In its complaint, CSN alleges that Ed Frazier, former President of Liberty Sports, and an unnamed "intermediary" were the only individuals with any actual knowledge of such information.^{8/} Yet neither of these individuals signed a declaration or affidavit attesting to the truthfulness of these claims. That the complaint does not have a declaration or affidavit from either of these individuals speaks volumes about the legitimacy of CSN's complaint. CSN is asking the Commission to rule that Cablevision has violated the law based entirely on hearsay, innuendo, and a distorted version of the facts. Because CSN has failed to support its factual claims with documentation or with declarations from those individuals who actually participated in the conversations that are the linchpin of CSN's complaint, the Commission should dismiss CSN's complaint. No party to a section 616 complaint should be excused from complying with the basic pleading requirements established by the Commission.

II. THERE IS NO BASIS FOR FINDING CABLEVISION IN VIOLATION OF SECTION 616

28. CSN's allegations of improper conduct by Cablevision are belied by the facts. First, Cablevision has been carrying CSN's Service on its Boston and Brookline systems for

^{7/} The complaint alleges only one instance where Greenberg supposedly was told by a Cablevision official that the Service would not be carried on any additional systems unless Cablevision received exclusive distribution rights. Complaint at ¶ 40. Notwithstanding the lack of exclusivity, however, Cablevision launched the Service on a permanent basis on its North Olmstead and Berea systems on April 15, 1997.

^{8/} Id. at ¶¶ 11, 35.

more than a year even though Cablevision does not have either a financial interest in CSN or exclusive distribution rights. More recently, Cablevision added carriage in its North Olmstead and Berea, Ohio systems without obtaining exclusive distribution rights. In the Ohio territories, in fact, Ameritech carries CSN on its cable systems in direct competition with Cablevision.

29. Second, where Cablevision has chosen not to carry the Service, there are ample legitimate reasons for its decision. In the New York market, for instance, CSN arranged to have the service carried by television station WBIS between July 1, 1996 and January 21, 1997. Because WBIS had elected must carry status in the New York ADI, the Service was carried by the vast majority of Cablevision's New York cable systems during that period. There was no rational basis for Cablevision to devote a second scarce channel to the Service. Additionally, Cablevision subscribers would not want to pay for a service in a tier when they could receive it for free through WBIS. Even though CSN is no longer carried on WBIS, the law does not compel Cablevision to carry the Service.

30. Cablevision has also declined to carry CSN's Service in New York and elsewhere because CSN has consistently overpriced this Service. CSN's rates did not reflect the fact that its rights to the programming it provided were non-exclusive -- so that it was particularly susceptible to duplication and competition. From the time of the earliest carriage negotiations, Cablevision has made clear that it regarded CSN's rates as too high for an untested, relatively new programming service. Cablevision had asked for a rate reflective of the value of its

markets, particularly the New York ADI,^{9/} which would have been significantly lower than the rates in the master agreement.

31. Before Cablevision was willing to launch the Service on its Boston and Brookline systems, the parties negotiated an amendment to the master agreement that reduced the rates for the Service and the penetration levels necessary for further rate reductions. After the successful conclusion of these negotiations, Cablevision launched the Service. By contrast, CSN was unwilling to consider lowering its rates to be launched in Cleveland.

32. Third, Cablevision has consistently agreed to carry the Service without obtaining exclusive distribution rights.^{10/} In none of the markets in which Cablevision currently carries the Service does it have exclusivity. While Cablevision requested exclusivity during its 1995 negotiations with CSN over the master affiliation agreement,^{11/} it signed that agreement even after CSN refused to grant it exclusivity. Subsequently, it was CSN itself that offered exclusivity as an inducement to Cablevision (and other cable MSOs) to expand their carriage of the Service in Connecticut and elsewhere. CSN even went so far as to offer to contest SNET's

^{9/} A New York ADI rate reflects the opportunity for the programmer to receive more advertising dollars and exposure because of the value of the New York market. Because more revenue would come from advertising, the programmer's rate to the cable operator would be lower.

^{10/} Nor has Cablevision conditioned carriage on purchasing CSN.

^{11/} Both Congress and the Commission have recognized the common use of exclusivity in carriage negotiations and have specifically declined to prohibit cable operators from asking for and receiving exclusivity rights. See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992 -- Development of Competition and Diversity in Video Programming Distribution and Carriage, 9 FCC Rcd 2642, 2648 (1993) ("Carriage Order").

claim to distribution rights, which were based on an affiliation agreement between CSN and Americast.

33. In effect, CSN's complaint presumes that CSN has a right to carriage on Cablevision's systems and on its New York systems in particular. CSN is flatly wrong. Nothing in the Act or the Commission's rules grants CSN a right to carriage. Sanctioning such a right would skew carriage negotiations and undermine the 1992 Cable Act's directive to "'rely on the marketplace, to the maximum extent feasible, to achieve greater availability' of relevant programming."^{12/}

34. Indeed, CSN's presumption of a right to carriage is belied by the terms of the master affiliation agreement it signed with Cablevision. That agreement sets the conditions under which Cablevision may carry CSN's Service; it does not compel Cablevision ever to exhibit the Service.

In effect, CSN now seeks a right of carriage from the Commission that it neither possesses under the law or under its own agreement with Cablevision.

35. CSN's complaint also ignores the editorial judgment accorded to cable operators. For a cable operator to attract subscribers and compete against other multichannel video programming distributors, it must be able to determine the editorial mix of programming that it concludes will best achieve that result. In certain circumstances, restrictions have been placed

^{12/} Id. at 2648, ¶ 15 (quoting 1992 Cable Act at § 2(b)(2)).

on their discretion.^{13/} Other than those limited cases, cable operators continue to retain their full rights to choose which programmers they will carry.

36. CSN also ignores the channel capacity constraints facing Cablevision and other cable operators. Many, if not most, cable systems in the country are currently channel-locked; that is, either all channels are currently carrying programming services or the few remaining channels are being reserved by the cable operator for future use. This situation has been compounded by the must carry and leased access obligations imposed on cable operators by the Cable Act. With numerous programmers already filling the remaining capacity, little, if any, space is available to new start-up services such as CSN.^{14/}

37. Each year, Cablevision receives dozens of requests for carriage from programming services. Few of them are carried on all of Cablevision's systems, including popular new cable programming services such as TV Land and Animal Planet. Cablevision's decision not to carry these services on all its systems does not violate any law. Rather, its decisions are based on numerous legitimate business reasons such as high rates required for some new services, unavailable channel capacity, limited subscriber interest, unfavorable editorial mix, and other practical and technical considerations.

38. Indeed, the channel capacity problem is so acute that Cablevision does not even carry a number of its newer affiliated programming services on its own systems. For example, The Independent Film Channel currently is unavailable on a number of its New York cable

^{13/} See, e.g., 47 C.F.R. §§ 76.56, 76.701

^{14/} To remedy the situation, cable operators, including Cablevision, have been rebuilding their systems to increase channel capacity to add new programming services. These rebuilds are slow and costly.

systems, including East Hampton, Riverhead, the Bronx, and Brooklyn... Similarly, MuchMusic cannot be seen on the Bronx, Brooklyn, and Newark systems. Likewise, Romance Classics is unavailable on the East Hampton, Riverhead, Newark, and Dutchess Cablevision systems.

39. Cablevision has provided CSN with carriage comparable to what it provides to other new services. Cablevision currently carries the Service on systems serving 161,000 subscribers. Presently, the Service is viewed by approximately 44,000 Cablevision households. In this regard, Cablevision's carriage of the Service is on a level similar to that afforded by other MSOs. For instance, on information and belief, CSN's Service reaches approximately 100,000 of Tele-Communications, Inc.'s ("TCI") 19 million cable television households. Significantly, Time Warner does not carry CSN on its vast New York cable system, and TCI carries CSN on only its Westchester County system in the New York area. For whatever reasons, TCI and Time Warner have each independently concluded that CSN's Service does not

currently fit their respective systems' needs.^{15/} On information and belief, CSN has not sued either of these cable operators.

40. The Commission made clear that section 616 does not preclude parties to "engage in legitimate, aggressive negotiations."^{16/} Moreover, the Commission noted that "the statute does not prohibit distributors from acquiring exclusivity rights or financial interests from programming vendors."^{17/} Indeed, the Commission recognized that in the context of good faith, arm's-length discussions, multichannel distributors may negotiate for such benefits in

^{15/} As a start-up service, CSN's difficulty obtaining carriage is not surprising. According to cable industry figures, start-up programming services, particularly those launched in the last few years, have had tremendous difficulty obtaining high penetration in the first few years of operation. See generally, Paul Kagan Associates, Inc., New Channel Parade Rolls On, Cable TV Programming, December 27, 1994, at 6 ("If cable program history is any guide, only one out of two or more networks with similar formats will achieve long-term economic survival."). A number of recent launches have failed. See, e.g., Paul Kagan Associates, Inc., More Cablenets Exit Stage Left, Cable TV Programming, November 30, 1996, at 2 ("Intro TV Network and NewsTalk Television will become history by Dec. 31 and the Popcorn Channel may not be far behind."). The reasons most often cited are limited channel space, expensive program formats, and lack of financing. Paul Kagan Assoc., Inc., Who's Next To Pull The Plug, Cable TV Programming, October 31, 1996, at 3.

Penetration rates for new, independent cable networks typically increase slowly and steadily, assuming that the network can survive the first few years of operation. CSN's development is typical. As of December 31, 1995, CSN has 5.2 million subscribers and 5.4 percent national cable household penetration. Paul Kagan Associates, Inc., Network Census: December 31, Cable TV Programming, January 26, 1996, at 12. This grew to 6.2 million subscribers and 6.5 percent penetration. Paul Kagan Associates, Inc., Network Census: June 30, Cable TV Programming, July 31, 1996, at 12. More recently, those numbers stood at 7.2 million subscribers and 7.4 percent penetration. Paul Kagan Associates, Inc., Network Census: December 31, Cable TV Programming, January 29, 1997, at 12.

^{16/} Carriage Order, 9 FCC Rcd at 2684.

^{17/} Id.

exchange for carriage on their systems so long as they do not insist on obtaining a financial stake as a condition for carriage.^{18/}

41. CSN's complaint is utterly devoid of the factual predicate necessary to make out a claim under section 616. Rather, CSN has presented the Commission with a garden-variety dispute between a programmer and a cable operator faced with a supply of programming that outstrips its capacity to accommodate that supply. Section 616 is not a charter for the Commission to rewrite arm's-length negotiations between a programmer and an operator that the programmer finds unsatisfactory -- yet that is just what CSN would invite the Commission to do. If the Commission finds CSN's complaint to be cognizable, it will soon find itself inundated with other similar complaints where an operator did nothing more but exercise its editorial judgment not to carry a particular service.

III. DISCUSSIONS BETWEEN RAINBOW AND CSN WERE UNRELATED TO THE NEGOTIATIONS OVER CARRIAGE

42. From its own rendition of the facts, it is clear that CSN initiated independent discussions concerning the purchase of a financial interest with Rainbow. CSN admits that Ed Frazier, former President of Liberty Sports and then a potential backer of CSN, approached Josh Sapan, President of Rainbow, to offer an opportunity to invest in CSN.^{19/}

43. Subsequent discussions, whether initiated by Rainbow officials or CSN, were totally unrelated to CSN's ongoing negotiations over carriage. As noted above, Rainbow

^{18/} Id.

^{19/} Complaint at ¶ 11.

pioneered sports cable programming more than twenty-five years before CSN's launch. For nearly ten years prior to CSN's launch, Rainbow's SportsChannel service has continuously included vintage sports programming and interviews. Rainbow had long been considering expansion of this programming into a full-time full service that would include more than just replays of old games, just as Rainbow's American Movie Classics offers commentary, original productions, and support for movie preservation efforts in addition to vintage films.

44. After CSN's initial approach through Frazier, Rainbow became interested in the possibility of purchasing CSN to help provide a subscriber base for launching this vintage sports service. To that end, it periodically discussed the issue with CSN. There was no coercion or threats. No one at Rainbow ever discussed carriage issues. There is nothing illegal about one programmer discussing the acquisition of another programmer. To the contrary, the purchase of a network to obtain its subscriber base as a basis to develop an improved service is not unprecedented within the industry.

45. Given the independent, legitimate basis for these separate negotiations with Rainbow and SportsChannel, they provide no basis for CSN's allegations that Cablevision has violated section 616. CSN does not -- and cannot -- allege that Cablevision ever asked for a financial interest in CSN as a condition of carriage.

46. CSN cites one supposed comment by Marc Lustgarten, Cablevision's Vice Chairman, to an unnamed "intermediary" addressing a financial interest in CSN. Of course, CSN presents no evidence to support this claim. This unnamed "intermediary" has not provided an affidavit that Lustgarten ever made such a comment. Instead, CSN has chosen to hide behind anonymity while it accuses Cablevision of violating the law. While Cablevision cannot fully

address this allegation without knowing who the intermediary is and what alleged conversation the intermediary refers to, Cablevision flatly denies that Lustgarten ever made this comment or sought to coerce CSN into selling an interest as a condition of carriage of the Service.

IV. THE COMMISSION SHOULD NOT PERMIT CSN TO USE THE CARRIAGE COMPLAINT RULES TO FORECLOSE OR INTERFERE WITH THE LAUNCH OF A SUPERIOR COMPETING SERVICE

47. CSN learned during its discussions with Rainbow that Rainbow was considering launching its own superior vintage sports service that would provide extensive vintage sports programming in addition to replays of old games. Based on Rainbow's pioneering role in the development of sports services and its expertise in running programming services, CSN knew that a Rainbow vintage sports service would present formidable competition to its own Service.

48. With competition imminent, CSN prepared to file this complaint as a means to forestall or eliminate the launch of Rainbow's competing vintage sports service. There can be no mistaking CSN's motives: It filed this complaint on the same day that Rainbow announced the launch of ASC. Instead of letting cable operators choose between CSN's Service and ASC, CSN has chosen to file a lawsuit to chill the launch of ASC. Such blatantly anticompetitive behavior should not be countenanced by the Commission.

49. Neither Congress in drafting section 616 nor the Commission in implementing that provision intended the carriage complaint process to be used as a weapon to stifle competition from a new cable programming service. But CSN's complaint is achieving precisely that result. A number of cable operators are afraid to carry ASC for fear of landing in the middle of this complaint. Some have even asked ASC to indemnify them against possible suits from CSN.